UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	**)**	
	)	
Isochem North America, LLC,	**)**	**Docket No. TSCA-02-2006-9143**
	)	
Respondent.	**)**	
	)	

ORDER ON COMPLAINANT'S THIRD MOTION TO COMPEL DISCOVERY

I. Procedural Background

The Director of the Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency, Region 2 ("Complainant") commenced this administrative proceeding by filing a Complaint on March 21, 2006 against Isochem North America, LLC ("Respondent" or "Isochem") for its alleged failure to file a "Form U" for 2002, as required by the Inventory Update Rule, 40 C.F.R. § 710.33(b), in regard to 19 chemical substances Respondent allegedly manufactured or imported in excess of 10,000 pounds during the relevant period (calendar year 2001) at its New Jersey and Texas Facilities. In its Initial Answer and Amended Answer, dated November 13, 2006, Respondent admitted ownership of the New Jersey and Texas Facilities, denied that its actions constituted violations of TSCA, and set forth "affirmative defenses." The parties filed their Initial Prehearing Exchanges in August 2006, and since then have filed several motions which have been ruled upon.

On December 27, 2007, an Order was issued, *inter alia*, granting Complainant's Motion for Accelerated Decision as to the 14 violations pertaining to Respondent's New Jersey Facility, denying Respondent's Cross-Motion to Dismiss the Complaint, and granting Respondent's Cross-Motion to Amend Answer to withdraw its admission and deny that it owned or controlled the Texas Facility. Therefore, the only violations for which liability remains in dispute are the five counts of violation regarding the Texas facility. In response to the directive in the December 27 Order to file any supplemental prehearing exchanges, Respondent submitted a Supplemental Prehearing Exchange on January 25, 2008, adding only one item to its original Prehearing Exchange, namely, a listing (but not a copy) of Isochem's financial statement for 2007.

On February 4, 2008, Complainant submitted its first motion to compel discovery, requesting that Respondent be ordered to provide a copy of the financial statements for 2007 referenced in Respondent's Supplemental Prehearing Exchange. On February 8, 2008, Complainant submitted its second motion to compel discovery ("February 8 Motion"), requesting an order to compel Respondent to answer interrogatories and to produce documents by April 1, 2008 and to direct Respondent to make its president and CEO, Mr. Slick, available for deposition

to be taken during the week of April 7, 2008. The motions were granted by Order dated March 6, 2008.

Respondent submitted its Response to the interrogatories and requests for production of documents on April 1, 2008 ("April 1 Response"). Subsequently, pursuant to Respondent's request, the date for Mr. Slick's deposition was set for April 17, 2008.

On April 3, 2008, Complainant submitted a third Motion to Compel ("Motion") requesting that Respondent be ordered to submit by April 10, 2008, via e-mail and overnight mail "complete and accurate" answers to certain interrogatories and to submit documents in response to certain Requests for Production numbers or supply valid reasons for withholding such documents.

To date, Respondent has not filed a response to the Motion.

II. Complainant's Arguments

Complainant submits the Motion on the basis that Respondent's responses to certain interrogatories and submitted documents are non-responsive and inadequate and that they amount to a violation of the March 6 Order. Complainant requests that, given the extremely limited time before Mr. Slick's deposition on April 17, Respondent submit by e-mail and overnight mail complete and accurate responses to Interrogatories in Section II, 1 through 12, 14 and 15, and documents requested in Requests for Production 1, 5, 6 and 8. Complainant notes that there are many other responses which are inadequate, but that it will follow these up at the deposition. [1] Motion, n. 3.

Complainant emphasizes that its requests required that Respondent supply a "complete and accurate response." Interrogatories 1 through 12 and 15 of Section II pertain to the Respondent's admissions in the Answer and Amended Answer that it owned the Texas Facility or pertain to the Form U submitted by Mr. Slick for the Texas Facility. For each of these Interrogatories, the April 1 Response states that it objects to the question on the basis of irrelevance, not being reasonably calculated to lead to the discovery of relevant information, and protection by attorney-client privilege, work-product doctrine, and/or trial preparation privilege,

[1] The Interrogatories submitted to Respondent include six categories of questions, with each category containing 8 to 17 questions. Complainant is requesting only that Respondent respond to 14 questions in Section II, and to four of nine Requests for Production of Documents.

and that its cross-motion to amend its Answer to deny that it owned, operated or controlled the Texas facility was granted. Complainant argues that this is non-responsive, the grounds for objection do not apply, and the question is relevant as certain facts lead to an inference that Mr. Slick was involved with a corporate entity that owned or controlled the Texas Facility. Interrogatory 14 asks what Mr. Slick intended to convey in a certain statement in his Reply Declaration of June 2007, and the April 1 Response states, "Mr. Slick did not intend to convey anything. He explained a statement made in his prior Declaration, the meaning of which was either misunderstood or not comprehended by Complainant." Motion, Exhibit 1. Complainant asserts that the response is argumentative, and requests that Respondent be ordered to clarify this statement, as Mr. Slick "obviously intended to convey something." Motion at 4.

Requests for Production 1 and 5 seek documents relating to Dow's ownership of the Texas site and "any and all documents that reveal, clarify, detail or otherwise explain the corporate relationship between and among Isochem NA, SNPE NA, SNPE Chemical and Groupe SNPE and SNPE S.A.," and for each, the April 1 Response states that Respondent "objects to the request in that it seeks information already in the possession, custody or control of Complainant and/or are matters of public record." Motion, Exhibit 2. Complainant asserts that these responses are erroneous and inadequate, in that Respondent has not supplied any information as to the first Request and not supplied sufficient information as to Request 5, and Respondent cannot know what is in Complainant's possession. Motion at 5.

Request for Production 6 seeks a representative sample of invoices issued by or for the Texas Facility during 2001, and the April 1 Response states that the Request "is vague and incomprehensible, and also because it seeks information that is irrelevant and not likely to lead to the discovery of relevant information." Motion Exhibit 2. Complainant asserts that this response is invalid and includes no rationale. Request for Production 8 seeks Federal and state tax documents for SNPE, Inc. and SNPE Chemical. The April 1 Response objects to the Request on the basis of irrelevance and documents being in possession of Complainant, but states that SNPE Inc. filed a consolidated Federal tax return, which for the relevant time period included SNPE Chemicals, Inc., and that in the event they find any separate state tax returns, Respondent reserves its right to submit them. Complainant states that such contingent event of finding state tax documents is an insufficient response.

Complainant argues that the documents in the record leave open the possibility that Respondent directly controlled the Texas Facility, as they indicate that SNPE Inc. and SNPE Chemicals, Inc. are related to control of the Texas Facility and that Mr. Slick has roles in all of these companies. Complainant suggests that, should this Tribunal later find that Respondent's reason for withholding the documents requested is without merit, an adverse inference be drawn regarding the contents of such documents. Motion at 7.

III. Discussion

In the March 6 Order, Respondent was ordered to respond to Complainant's

Interrogatories and Requests for Production. Complainant's February 8 Motion requested an order to compel Respondent to answer interrogatories and to produce documents, and enclosed the Interrogatories and Requests for Production of Documents. Under the Rules of Practice, Respondent was given the opportunity to object to any Interrogatories or Requests for Production in a response to the February 8 Motion. To request discovery under the Rules of Practice, a motion must be filed with the proposed discovery instruments and a detailed description of the nature of information and documents sought. 40 C.F.R. c 22.19(e)(1). A party is entitled to file an opposition to such motion. 40 C.F.R. c 22.16(b). A ruling on a motion for discovery must include a finding, *inter alia,* that the information sought has significant probative value on a disputed issue of material fact relevant to liability or the penalty. 40 C.F.R. c 22.19(e)(1). Thus, the opportunity to object to discovery requests occurs in a response to the *motion* for discovery under 40 C.F.R. c 22.19(e)(1), unlike voluntary discovery in Federal court proceedings under Federal Rule of Civil Procedure 33, where objections are expressed in the responses to the discovery requests served on a party.

Respondent failed to respond to the February 8 Motion, even after Complainant reiterated its requests to compel discovery by letter dated March 4, 2008. Thus, Respondent was deemed in the March 6 Order to have waived any objection to the granting of the motion under 40 C.F.R. § 22.16(b), including any objection to the relevance or probative value of the Interrogatories or Requests for Production. Furthermore, the Order stated that the document requests and interrogatories seek information not yet provided as to control of the Texas Facility, and would have significant probative value on the issue of control of the Texas Facility, which is relevant to liability. March 6 Order at 6. Because such ruling has been issued as to relevance and probative value of the Interrogatories and Requests for Production, no further ruling is necessary, as it would be merely duplicative, on Respondent's belated attempt to oppose certain Interrogatories and Requests for Production and on Complainant's current Motion. Accordingly, the Motion is denied.

That said, Respondent's failure or refusal to respond, or to adequately respond, to the Interrogatories and Requests for Production is at its own peril. Respondent was specifically warned in the March 6 Order that its failure to comply with a discovery request may result in imposition of sanctions under 40 C.F.R. c 22.19(g), which provides that "Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion . . . [i]nfer that the information would be adverse to the party failing to provide it [or] . . .[e]xclude the information from evidence." 40 C.F.R. c 22.19(g)(1) and (2). March 6 Order at 7-8.

While it is EPA's burden to prove that Respondent owned or controlled the Texas Facility by a preponderance of the evidence, after Complainant's presentation of a prima facie case, Respondent has the burden to present any defense to the allegations. 40 C.F.R. § 22.24. Of course, neither party is required to prove its case in discovery. *Fidelity National Title Insurance Co. of NY v. TCF National Bank of Ill.,* 2003 US Dist. LEXIS 19190 (N.D. Ill. Oct 27, 2003). However, Respondent is hereby advised that mere statements of a corporate officer, without

documentary evidence in support, may be insufficient to rebut Complainant's evidence. Self-serving testimony by corporate officers, uncorroborated by documentation, is generally given little weight. *Zaclon Inc.*, EPA Docket No. RCRA-05-2004-0019,2006 EPA ALJ LEXIS 23 * 21 (May 23, 2006); *Central Paint & Body Shop*, 2 EAD 309, 315 (CJO 1987)(citing *Holland v. Comm. of Internal Revenue*, 728 F.2d 360 (6th Cir. 1984) and *Eagle Lion Studios v. Leow's, Inc.*, 248 F.2d 48 (2nd Cir. 1957)). Furthermore, Respondent's failure to respond sufficiently to proper discovery requests may reflect on Respondent's credibility. *Joshi v. Professional Health Services, Inc.*, 606 F. Supp. 302, 210 (D. DC 1985)(failure to submit sufficient responses to interrogatories or requests for production supports a finding of lack of credibility).

Even if Respondent's objections were entertained at this point, they would not have merit for the following reasons. Interrogatories 1 through 12 and 15, addressing the admissions in the Answer and Amended Answer of Respondent's ownership of the Texas Facility, and Mr. Slick's filing of the Form U for the Texas Facility, have significant probative value on the issue of control of the Texas Facility either directly or with regard to Respondent's and Mr. Slick's credibility on the issue. "That the answers to interrogatories may be used for impeachment is no bar." *Rediker v. Warfield*, 11 F.R.D. 125, 128 (S.D.N.Y. 1951), citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Discoverable information includes evidence relevant to the credibility of a party or a key witness. *Thong v. Andre Chreky Salon*, 247 F.R.D. 193, 196 (D.D.C. 2003). Respondent's assertion that the information sought by the Interrogatories may be privileged does not apply to communications of Mr. Slick which were made with the understanding that they were to be conveyed to Complainant. "When a communication is made by a client to his attorney with the understanding that it is to be imparted to a third party, no privilege exists." *Rediker v. Warfield*, 11 F.R.D. at 128.

As to the Requests for Production, the fact that Complainant may have obtained some documents from Dow Chemical Company or could obtain them from a public record does not indicate that Complainant seeks information that is not "most reasonably obtained from" Respondent. 40 C.F.R. c 22.19(e)(1)(ii); see also, *Rediker v. Warfield*, 11 F.R.D. at 128 ("The fact that a party has already obtained the benefits of the deposition-discovery procedure as to one [person] does not foreclose him from proceeding under the provisions with respect to [a] defendant[]."). Respondent can most reasonably provide the information requested and is obligated to do so although certain information requested may be a public record. As to the request for invoices, these should be available to Mr. Slick, as in the April 1 Response, Respondent asserts that it sold certain chemicals manufactured by SNPE Chemicals, Inc. (April 1 Response ¶¶ III.13, III.14), that Mr. Slick was vice president and CEO of SNPE Chemicals, Inc. (April 1 Response ¶¶ IV.1, IV.2, IV.7), that his responsibilities in SNPE Chemicals involved production planning (April 1 Response ¶ V.6, V.12) and that he was also vice president and CEO of SNPE, Inc. (April 1 Response ¶ IV.3). Motion, Exhibit 1.

In view of the above, Respondent may supplement its April 1 Response by submitting to Complainant further responses to Interrogatories and/or Requests for Production on or before the date stated below. After that date, Complainant may file any appropriate motion for sanctions under 40 C.F.R. c 22.19(g).

ORDER

1. Complainant's Motion to Compel, dated April 3, 2008, is **DENIED** .

2. Respondent may supplement its April 1 Response by submitting to Complainant by e-mail or facsimile further responses to Interrogatories and/or Requests for Production on or before **April 14, 2008.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: April 10, 2008
Washington., D.C.